U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 10 December 2002

CASE NO.: 2001-LHC-2882

OWCP NO.: 07-156097

IN THE MATTER OF:

JAHYRI COLEMAN

v.

BOLLINGER SHIPYARD, INC.

Employer

AMERICAN LONGSHORE MUTUAL ASSOCIATION, LTD.

Carrier

APPEARANCES:

William Vincent, Jr., ESQ.

For The Claimant

Robert S. Reich, ESQ.
L. Stephen Cox, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Jahyri Coleman (Claimant) against Bollinger Shipyard, Inc. (Employer) and American Longshore Mutual Association, Ltd. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on May 30, 2002 in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 10 exhibits, Employer/Carrier proffered 19 exhibits which were admitted into evidence along with one Joint Exhibit.

Because Claimant submitted an untimely report that was excused, the record was left open for 30 days to allow Employer to take further depositions and perform more evaluations; however, no further post-hearing development was offered by Employer, nor did Employer request additional time to submit further evidence. The record was closed on July 2, 2002. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on August 12, 2002 and July 30, 2002 respectively. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. Claimant was injured on April 3, 2000.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employer/employee relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on April 3, 2000.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

5. That Employer/Carrier filed a Notice of Controversion on April 20, 2000.

6. That an informal conference before the District Director was held on February 20, 2001.

7. That Claimant received temporary total disability benefits from April 7, 2000 to April 16, 2000 at a compensation rate of $225.32 for 1.37 weeks.

8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

9. That Claimant's average weekly wage at the time of injury was $363.57.[2]

II. ISSUES

The unresolved issues presented by the parties are:

1. Whether Claimant has reached maximum medical improvement.

2. Whether Claimant may return to work without restrictions.

3. Claimant's medical condition.

4. Claimant's current wage-earning capacity.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

At the hearing, Claimant testified he was 25 years old and a high school graduate. (Tr. 52). Claimant began working for

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[2] In post-hearing development, the parties stipulated to Claimant's average weekly wage, which is hereby received as a stipulation and supported by the record. See Employer's Post-hearing Brief, p. 10; Claimant's Post-hearing Brief, p. 3.

Employer as a "roustabout." He operated a pressure washer, shoveled sand, and carried equipment, including ladders, welding cables, and buckets of paint which weighed "30 to 40 pounds." (Tr. 60, 62-64). The most Claimant had to lift was "almost 80 pounds ... 40 pounds apiece in both hands." Claimant estimated "about 60 percent" of his work was performed "overhead." (Tr. 64).

On April 3, 2000, Claimant testified he injured himself while pressure washing a tank room inside the bottom of a boat. (Tr. 61, 64). Upon completing his job in the boat, he handed his equipment to a co-worker and proceeded to climb up and out of the space in which he was working. He stated it was "pitch black and I couldn't see." He began sliding on a wet surface and hit the left side of his forehead on a beam.[3] Although he was wearing a hard hat, Claimant stated he was knocked out "for like two or three minutes." (Tr. 64-65).

When he regained his senses, Claimant screamed for attention, and co-workers helped him off the boat. As a result of his injury, Claimant had "a big old knot on my forehead" and felt neck pain, back pain and headaches. He was led to "a little room and they put an ice pack on my head." Claimant remained in the room for "about two or three hours" before he was brought to the company physician, who prescribed medication. (Tr. 66-67).

Claimant treated with the company physician for "about a week," until he chose to see Dr. Flood with Employer's permission. Dr. Flood examined Claimant and ordered X-rays and a CAT scan. He prescribed muscle relaxants and pain medicine. He also recommended treatment with a physical therapist and chiropractor. He and Claimant discussed treatment with Dr. Glenn Manceaux, a chiropractor and physical therapist. Consequently, Claimant sought treatment with Dr. Manceaux. Nonetheless, Claimant's head continued hurting, and Dr. Flood recommended a neurologist. (Tr. 68-71, 74-76).

In June 2000, Employer sent Claimant to Dr. Trahant, a neurologist, per Dr. Flood's advice. Claimant stated he still suffered headaches, neck pains, and blackouts. Dr. Trahant saw Claimant on one occasion and did not prescribe any medications. Claimant continued experiencing blackouts and pain in his head, neck and back for "about a month or two" after he saw Dr. Trahant. (Tr. 69-72).

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[3] In the past, Claimant experienced some dizziness from an inner ear problem; however, he was treated for the condition, which resolved prior to this accident. (Tr. 73).

Meanwhile, after beginning treatment with Dr. Flood, Claimant went to see Dr. Christopher Cenac at Employer's request. (Tr. 80). Claimant testified that he did not continue treating with Dr. Cenac, and was sent by DOL to visit Dr. Lea, who briefly examined Claimant. Dr. Lea concluded surgery was unadvisable because of Claimant's age. Claimant stated Dr. Lea did not have copies of his MRIs that were to be supplied by the insurance company. At his visit with Dr. Lea, Claimant doubted whether Dr. Lea believed what he was saying. (Tr. 80-81).

When Dr. Flood retired, Claimant began treating with Dr. Bernard Manale, who performed an MRI on his neck and lower back. Dr. Manale found two bulging discs in his neck. (Tr. 73-74). Claimant continued experiencing pain over the course of Dr. Manale's treatment, including his visit with Dr. Manale in May 2001. Claimant experienced pain in his neck when he turned it "from right to left, looking up and down." Lifting weights caused Claimant to feel sharp, "shooting" pains in his neck. Claimant testified the level of his pain at the time of the formal hearing was the same as that of May 2001. (Tr. 76-78).

In May 2001, Claimant's back pains "slacked," but his neck still bothered him.[4] (Tr. 77). On May 16, 2001, Dr. Manale concluded Claimant's disability was temporary and total from May 16, 2001 to July 16, 2001. (Tr. 80). Dr. Manale allowed Claimant to try cutting grass. (Tr. 82). Claimant testified that he cut grass for neighbors until "it got cold ... because the grass wasn't growing." He charged about $25.00 per yard. (Tr. 83).

In June 2001, Claimant was involved in a motor vehicle accident while sitting in his car waiting for an order of food at a drive-through restaurant. A person failed to stop on time, and rear-ended Claimant's car, traveling "about five mile[s]" per hour. Claimant felt increased symptomatology right after the impact, and sought treatment at a local hospital. (Tr. 78, 131). Claimant received $900.00 from GEICO as a settlement for minor damage to his automobile. (Tr. 99-103). On cross-examination, Claimant confirmed that he experienced neck pain as a result of the car accident and went to the Chabert Medical Center emergency room. (Tr. 131).

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[4] Likewise, Claimant stated in his October 2001 deposition that his low back was "fine." (EX-14, p. 7).

On July 12, 2001,[5] Dr. Manale treated Claimant for his condition after the car accident. This was not his regularly scheduled appointment. Rather, Claimant "called and told him I had got in an accident, and he told me to come in and see him." (Tr. 79). He concluded Claimant's disability was temporary and total from July 12, 2001 until August 12, 2001. (Tr. 80). Claimant stated he was unaware of ever being released by any treating physician to go back to his regular job. (Tr. 91).

Claimant was evaluated by Dr. George Murphy, who provided a "full, complete medical exam." Dr. Murphy reviewed Claimant's MRI films and placed restrictions on lifting "anywhere from about 30 to 40 pounds...." (Tr. 91, 93). Based on Dr. Murphy's restrictions, Claimant does not believe he can return to his prior job. (Tr. 93). On cross-examination, Claimant stated Dr. Murphy informed him not to lift from 50 to 60 pounds. (Tr. 149).

Claimant's past employment history reveals he worked part-time as a sales clerk for Autozone, earning $5.50 per hour. (Tr. 53). From May 1996 to November 1996, Claimant worked "basically like a roustabout" for Haliburton, cutting grass, painting, and "washing different parts down." He lifted "60 to 70 pounds, maybe sometime like a hundred pounds" while working for Haliburton. (Tr. 53-54). Claimant also worked for the Terrebonne Parish Water District as a water meter-reader, earning $5.15 per hour. (Tr. 55). Claimant was employed by Oilstate/Smatco as a warehouse worker, earning $8.00 per hour where he would lift parts that weighed "about 40 to 50 pounds, 60 pounds" and place them on a cart to drive to location elsewhere in the building. (Tr. 56-57). Claimant worked for K-Mart, earning $6.00 per hour, lifting crates that weighed "about 30 to 40 pounds" and carrying them around the store in connection with remodeling projects. (Tr. 57-58). Claimant worked for Footlocker about five months, earning around $5.50 per hour. (Tr. 59).

Claimant stated he has been looking for a job. He reapplied with Footlocker and "went" to Athlete's Foot and FootAction in February and March 2002. (Tr. 113). He stated he also applied for a meter reading job with Terrebonne Parish and also went to the courier drop in Houma, Sears, and the bus garage in Terrebonne Parish. (Tr. 83). His attempts were unsuccessful. Claimant also applied for jobs identified by Mr. Crane, Employer's vocational expert. The jobs ranged from $5.50 per

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[5] Claimant testified his "workman's comp had cut me off." He added Employer has not paid for outstanding medical bills. (Tr. 104).

hour to $7.44 per hour. (Tr. 83-91). Claimant has not "heard back from any of these people;" however, applications were only made within days before the formal hearing. (Tr. 162). Claimant believes he could have done all of the jobs identified in Mr. Crane's report "at least since May 11, 2001." (Tr. 91).

On cross-examination, Claimant acknowledged that he testified at his October 2001 deposition that the most he had to lift at Employer's job was "50, 60 pounds, two times a week." (Tr. 118-119). He further affirmed that, in his pre-visit questionnaire for Dr. Flood, he indicated the most he had to lift at his former job was "30 to 60 pounds." (Tr. 119-121; CX-2, p. 33). He also confirmed his deposition testimony that his average lifting was 30 to 40 pounds. (Tr. 122-123). He also stated at his deposition that he could lift his 30-40 pound lawnmower out of his truck and his daughter, who then weighed 35-40 pounds. (Tr. 123-126).

Claimant stated he visited a hospital when he sustained a "minor" neck injury in a motor vehicle accident in 1997.[6] (Tr. 129-130). He stated that he did not disclose the injury when he applied for work with Employer. (Tr. 129). He also did not inform Drs. Flood or Murphy of the 1997 car accident. (Tr. 130, 148).

Likewise, Claimant stated he sustained a neck injury from another automobile accident on February 11, 2002.[7] Claimant affirmed that he went "to get checked out" because he was having a "little neck pain." (Tr. 134-135). Claimant was a passenger in his girlfriend's car when it was side-swiped. (Tr. 133-135). Claimant settled the matter for $900.00, and signed a "release of all claims," involving "any injuries, including future medicals associated with your neck." (Tr. 136-137; EX-20). Because he sustained no property damage in the accident, Claimant stated his release specifically covered his personal injuries, including his neck injury. (Tr. 138-139). Claimant did not tell Dr. Murphy about this accident when Dr. Murphy evaluated him on February 28, 2002, nor did he recall telling Dr. Murphy about the injuries sustained in 1997 or in June 2001. (Tr. 147-148).

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[6] In an October 2001 deposition, Claimant stated he injured "just my back" and did not have any problems with his neck. He stated he did not know of any other automobile accidents in which he was involved other than the 1997 accident. (EX-14, p. 4).

[7] Claimant failed to disclose this accident in his Answer to Supplemental Interrogatories dated April 9, 2002. (EX-16, p. 2).

On cross-examination, Claimant testified that, since his deposition of October 30, 2001, he has been physically able to work as a meter reader. He is also capable of working as a shoe salesman since November 2001. (Tr. 139-141). He has been capable of mowing lawns since May 2001. (Tr. 141). He also stated, as of his deposition, he could water blast and paint houses as early as May 2001. (Tr. 144). Claimant maintained no books on his earnings cutting grass and did not file tax returns on his earnings. (Tr. 146).

The Medical Evidence

Medical Record of Terrebonne General Medical Center

On April 2, 1997, Claimant was treated at the Emergency Room at Terrebonne General Medical Center for injuries sustained in a motor vehicle accident involving no vehicle damage. His chief complaint was neck pain. (EX-11, p. 3). He was prescribed ibuprofen and flexeril and discharged with instructions to apply ice intermittently followed by moist heat, to rest, and to follow-up with another physician. (EX-11, p. 4). An X-ray of the cervical spine revealed no evidence of fracture, and was otherwise reported as "normal." (EX-11, pp. 3, 5).

Dr. Michael Marcello, M.D.

On April 3 and 4, 2000, Dr. Marcello treated Claimant when Claimant "slipped and hit his head." (EX-4). He noted that there was no evidence or history of any pre-existing injury, disease, or physical impairment. On April 3, 2000, Dr. Marcello diagnosed scalp hematoma and a concussion without loss of consciousness. (EX-4, pp. 2-3). He believed the condition was caused or aggravated by Claimant's employment activity. (EX-4, p. 1). He returned Claimant to modified work, including sedentary work and tool room work. (EX-4, pp. 2-3). Dr. Marcello anticipated no permanent effects from Claimant's injury. (EX-4, p. 1).

Dr. Stephen J. Flood, M.D.

On April 26, 2000, Dr. Stephen Flood first examined Claimant for neck and back pain "which doesn't have any significant radicular component." (CX-2, pp. 10, 13-15). He noted Claimant had a bump on his forehead. He further reported that Claimant did not have cervical spasms, and observed a "full range of motion of [Claimant's] cervical spine." A cervical X-ray provided "no evidence for fracture, dislocation, or subluxation. Disc spaces are reasonably well maintained." (CX-2, pp. 13-14;

EX-6).

Dr. Flood found that Claimant identified his primary area of lumbar tenderness was “at about L2." He noted Claimant had “quite remarkable paralumbar spasms.... Straight leg raising bilaterally gives him back pain.” Lumbosacral X-rays indicated “no evidence for fracture, dislocation, or subluxation. Disc spaces are well maintained.” (CX-2, p. 14).

Dr. Flood’s primary concern was Claimant’s severe headaches with blacking out spells. (CX-2, p. 15). He indicated there was “evidence for a cervical syndrome and lumbar syndrome.”[8] Dr. Flood recommended a neurological assessment and ordered a CAT scan of the head, and an MRI of the lumbar spine.

On June 23, 2000, Dr. Flood saw Claimant for the last time before Dr. Flood retired. Claimant complained of residual neck aches, low back pain, and headaches. He noted that he reviewed the reports of Drs. Cenac and Trahant as well as “a report of normal CAT scan of [Claimant’s] brain” and “a normal MRI of the lumbar spine.” Orthopedically, Dr. Flood considered Claimant would reach MMI “after we get a Functional Capacity Evaluation on him.” He recommended one more visit with Dr. Trahant to treat Claimant’s residual headaches. Dr. Flood opined Claimant was temporarily, totally disabled “pending the FCE and follow-up with Dr. Manale.” (CX-2, p. 9).

Dr. James W. Keating, M.D.

On May 30, 2000, Dr. Keating provided the CT brain scan and lumbar MRI Dr. Flood requested. The results of both examinations were normal. (CX-2, pp. 19-21; EX-6, pp. 1-2).

On August 29, 2000, a cervical MRI revealed mild posterior bulging discs at C4-5 and C5-6. (CX-2, p. 18).

Dr. Christopher E. Cenac, M.D.

On May 31, 2000, Dr. Cenac, an orthopedist, examined Claimant at the behest of Carrier. Dr. Cenac reviewed medical reports of Drs. Marcello and Flood and noted Claimant was referred to a neurologist, Dr. Freeman, but had no report from that physician. He further noted that a CT and MRI scan were

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[8] Dr. Manale described cervical and lumbar syndrome as “general terms to mean sprains or injuries of some sort. Not fractures. Just sprains or strains.” (CX-3, p. 4).

performed on May 30, 2000, and the results "should be forwarded for review."

Dr. Cenac observed no bruises on Claimant's forehead, nor any on the Claimant's low back. He stated, "Waddell signs are multiple and positive consistent with symptom magnification and illness behavior. No motor, sensory, or reflex deficits are noted in the upper or lower extremities." Dr. Cenac observed "normal motion in the neck and limited voluntarily in the low back. Shoulder function is normal .... Muscle spasm is not observed. Non-physiological responses are observed to palpitation of the lumbar musculature." He determined that cervical X-ray studies "revealed no fracture" and lumbar studies were normal. He concluded there was "no evidence of residual from the alleged incident 4/3/00. I will review the medical tests and additional comments will be forwarded." He opined Claimant could return to his prior employment without physical limitations, and needed no further medical evaluation or treatment. (CX-2, p. 23; EX-2, p. 3).

Dr. Daniel J. Trahant, M.D.

On June 2, 2000, Dr. Trahant, a neurologist, evaluated Claimant at the request of Carrier and noted Claimant complained of headaches, occasionally severe enough to cause him to feel "dizzy, as though he were about to pass out," since the April 3, 2000 accident. Claimant further complained of vision problems associated with the headaches. Other complaints included neck and back pain, described as "aching and tightness, without radiation." Dr. Trahant noted a CAT scan of the brain was performed 2 days prior to his evaluation, but he was not provided the results. (CX-2, pp. 25-26; EX-5, pp. 1-2).

He observed that Claimant's neck was "supple with full range of motion without significant cervical muscle spasm or tenderness." A neurological examination revealed "all cranial nerves were intact." The "examination itself was entirely normal, with no focal or localizing signs." Claimant otherwise demonstrated no sensory abnormalities, and had "normal muscle tone, strength and bulk throughout." (CX-2, p. 26; EX-5, p. 2).

He concluded Claimant suffered a "cervical strain, though I found on exam no evidence of any cervical muscle spasm. I certainly find no sign of cervical radiculopathy or myelopathy." He opined Claimant "most likely did suffer a cerebral concussion at the time of accident ... [and is] having posttraumatic headaches." He expected Claimant to improve "over the next several weeks," and "should be able to return to work at this

time in a light duty capacity. He should be able to return to work at full duties within the next 3-4 weeks." (CX-2, pp. 26-27; EX-5, pp. 2-3).

Dr. Bernard Manale, M.D.

The parties deposed Dr. Manale on January 9, 2002. (CX-3). On July 25, 2000, Dr. Manale, to whom Dr. Flood referred Claimant, first saw Claimant for persistent symptoms stemming from his work-related injury. He noted Claimant stated his neck bothered him more than his back. Examination of the cervical spine revealed tenderness mostly at "C4-5 and the associated paralumbar regions." Claimant had markedly restricted range of motion in all areas. Dr. Manale observed his "neurological examination, however, was all normal, [s]o it was just a question of pain and restricted motion." He concluded Claimant was totally disabled from work because Claimant was still under observation, complaining of headache and restricted motion in his neck. (CX-2, pp. 8-9; CX-3, pp. 4-5). He diagnosed cervical/lumbar syndrome and headaches with blackout spells. Dr. Manale placed Claimant on total temporary disability status from 6/23/00 to 8/23/00. (CX-2, p. 8).

On August 29, 2000, Dr. Manale noted Claimant's symptomatology "continues with both neck and low back pain." He noted Claimant's "cervical region is most problematic for him. Brief examination does not reveal any new findings of the cervical spine." (CX-2, p. 37). He again diagnosed cervical/lumbar syndrome and headaches with blackout spells. (CX-2, p. 7). Claimant's total temporary disability status from his prior work was extended from 8/29/00 to 10/3/00. (CX-3, p. 5).

On October 3, 2000, Dr. Manale saw Claimant after a cervical MRI was performed on August 29, 2000. Dr. Manale observed "Cervical examination shows approximately 80% normal motion with questionable moderate spasm." Dr. Manale explained his indication of "questionable moderate spasm:"

> Means I couldn't be sure. I was feeling a little – maybe some tightness in the muscles of his back but I was afraid to call it spasm. It wasn't constant. So I just gave him the benefit of the doubt and put down questionable. I wasn't sure.

(CX-3, p. 6).

Dr. Manale reviewed Claimant's cervical MRI and noted a "small bulging disc at C4-5 and C5-6." Dr. Manale explained:

> [T]he MRI is not a test that speaks for itself. You can't jump at a conclusion and you can't say he injured those discs when he fell although it's possible. The only way you could know what the fall did as far as the MRI was if you had an MRI before he fell or if you have some statistical information which tells you that more likely than not what it might have been.
>
> Be that as it may when you see small disc bulges in a fairly young man what we do is watch them, treat them conservatively, and as soon as their function permits to return to what they want to do we let them go.

(CX-3, p. 5).

Dr. Manale assigned Claimant's disability status as "total temporary from 10/3/00 to 11/28/00." He explained that he was "waiting for the symptoms to quiet down" and that "you can assume that statistically, there's a good bet that the injury provoked the bulging discs but you don't know for sure." He added that, if Claimant recovered to the point that he wanted to go back to work, "this MRI does not constitute a contraindication of him returning to work of any sort as I see it." Only conservative, symptomatic treatment was planned. (CX-2, p. 6; CX-3, p. 5). He diagnosed cervical sprain, lumbar sprain, and cervical degenerative disc disease. (CX-2, p. 6).

On November 28, 2000, Dr. Manale noted Claimant still complained of neck pain, which was made worse by cold weather, a common complaint of joint dysfunction. He observed Claimant had "barely 20 degrees of motion in any plane today with guarding," which means Claimant "didn't want to move his neck because of pain or for some other reason," or let Dr. Manale move his neck. (CX-2, p. 5; CX-3, pp. 6-7). Dr. Manale observed that, if Claimant "didn't really get better he might even have to have surgery." Dr. Manale could not say that there was evidence of malingering, but "if the man is exaggerating, that's possible ... there's not any reason I can deny that." (CX-3, p. 6). Claimant wanted to proceed with definitive options which will involve an anterior cervical diskectomy and fusion at C4-5 and C5-6, according to Dr. Manale. Dr. Manale diagnosed cervical disc, lumbosacral neuritis, and headaches. He assigned Claimant's disability status as "total temporary 11/28/00 thru 01/28/01." (CX-2, p. 5).

On January 10, 2001, Dr. Manale noted Claimant's symptoms continued, including intermittent numbness in his arms and legs. He "couldn't find anything" upon examination and noted the complaint of numbness for observation. (CX-3, p. 6). He diagnosed cervical sprain, lumbar sprain, and degenerative disc disease. (CX-2, p. 5).

On January 22, 2001, Dr. Manale noted Claimant complained of more neck pain. He observed Claimant did not complain about his back. He found Claimant's "cervical motion was restricted less than 50 percent in all planes by pain and spasm." He diagnosed cervical disc displacement, lumbosacral neuritis, and headaches. (CX-2, p. 4). He assigned Claimant's disability status as "total temporary 01/22/01 thru 3/22/01." (CX-2, p. 4; CX-3, p. 7).

On March 19, 2001, Dr. Manale noted that Claimant desired surgery based on the opinion of another doctor, "Dr. Lee," who recommended surgery.[9] (CX-2, p. 4; CX-3, p. 7). Dr. Manale advised Claimant to have a discogram first. He added:

> There wasn't enough information for me to be sure that the pain was indeed coming from the bulging disc although that's the most likely possibility. I thought in this particular case we would do better to confirm it with a discogram before advising surgery.

(CX-3, p. 7).

He assigned "common sense" limitations on looking up, looking down, and working with his arms above shoulder level to avoid making pain worse. He stated, in situations like Claimant's, he usually recommends avoiding lifting above 20 pounds. He diagnosed cervical disc displacement, lumbosacral neuritis, and headaches. (CX-2, p. 4). He assigned Claimant's disability status as "total temporary 03/19/01 thru 4/19/01." (CX-3, p. 7).

On April 16, 2001, Dr. Manale noted Claimant complained of persistent neck and low back pain. There was indication of pain shooting from the neck down to the left hip. He found Claimant had "some restricted motion, some mild spasm in his upper limbs, and neurological examination was normal." Dr. Manale noted the

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[9] The record contains no records or opinions of "Dr. Lee." It is noted that Dr. Randall Lea did not recommend surgery or a discogram. Any opinion regarding surgery from "Dr. Lee" is not only hearsay but is not otherwise supported by the record evidence.

spasms were an objective finding related to pain in Claimant's neck. He again diagnosed cervical disc displacement, lumbosacral neuritis, and headaches. (CX-2, p. 3). He assigned Claimant's disability status as "total temporary 04/16/01 thru 5/16/01." (CX-2, p. 3; CX-3, p. 7).

On May 16, 2001,[10] Dr. Manale noted Claimant continued complaining of neck pain and back pain. Requests for a cervical discogram were "unsuccessful thus far." He identified paracervical tenderness and mild palpable spasm. He found a "trigger point," an area of localized tenderness, in the upper left trapezius, and injected a local anesthetic for pain relief. He diagnosed cervical disc displacement, lumbosacral neuritis, and headaches. He noted, "We will refill his medication and have reminded him to avoid reaching and overhead activity." He indicated Claimant's disability status was "total temporary 05/16/01 thru 07/16/01." (CX-2, p. 2-3; CX-3, p. 8).

On July 12, 2001, Dr. Manale last saw Claimant, who he noted was in a motor vehicle accident on June 11, 2001. He noted Claimant complained of neck pain after the accident and was taken to the emergency room in Houma by ambulance. (CX-2, p. 2). He stated, "When I saw him the neck was worse." (CX-3, p. 10). He also noted Claimant felt more neck pain than back pain. Claimant had cervical motion of "less than 20 degrees in any plane with spasm." Dr. Manale recommended a cervical MRI. He added that the July 12, 2001 visit was "probably" his regularly scheduled visit regarding his Workman's Compensation case. He diagnosed cervical disc displacement, lumbosacral neuritis. He assigned Claimant's disability status as "total temporary 07/12/01 thru 08/12/01." (CX-2, p. 2; CX-3, pp. 11-12).

On January 9, 2002, Dr. Manale opined in his deposition that Claimant "sustained a cervical sprain and head injury and injury and sprain of his lumbar spine. I attribute those symptoms and those findings to his injury." Dr. Manale stated he was unaware that Claimant "had some previous problems with vertigo and that he had undergone a CT scan of his head" in 1998, nor was he aware of any automobile accident involving Claimant prior to April

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[10] A notation in Dr. Manale's records states "As of 5-2-01, workers comp is no longer responsible per Adj. Will Sheplar (7-31-01)." (CX-2, p. 2). Dr. Manale stated the note was entered on July 31 "informing us going back as far as May 2 Workman's Comp was no longer responsible...." He added that he saw Claimant on May 16, 2001 and July 12, 2001 "under the assumption that Workman's Compensation was still authorizing and paying for [Claimant's] treatment." (CX-3, p. 9).

2000. (CX-3, p. 9). Dr. Manale concluded Claimant reached maximum medical improvement in May 2001, before Claimant's automobile accident in June 2001. (CX-3, p. 10).

Dr. Randall D. Lea, M.D.

On April 18, 2001, Dr. Lea, an orthopedic surgeon, performed an independent medical examination of Claimant at the request of Department of Labor. He found Claimant is a "6'3", 160 pound male in no acute distress." (EX-3, p. 8). He diagnosed Claimant with a cervical strain and lumbar strain. He noted he had no report or other evidence of any prior cervical injury, and concluded "an injury of the sort [Claimant] describes as having occurred while working can result in some cervical and possibly even some lumbar discomfort as well." Dr. Lea concluded there was difficulty determining the exact nature and extent of Claimant's condition. He observed Claimant demonstrated "a very skewed pain profile" in the cervical and lumbar area. He found Claimant had "nearly every positive Waddell's finding that you can have...," suggesting Claimant's complaints "may be borderline absurd." (EX-3, p. 12). He added:

> Perhaps if this individual had more significant findings reported on his MRI or objective findings on his physical exam, then some of the symptom dramatization could be explained. However, I do not see anything reported on the cervical MRI or the lumbar MRI (the lumbar MRI was normal) that would result in him complaining of pain to the level that he does in relationship to the alleged blow he had while working.

(EX-3, pp. 12-13). Dr. Lea opined Claimant had a "markedly overdramatic pain response or either has some ongoing, non-work related problem that could be causing the symptoms he has at this point." He stated that he was "far from an expert on metabolic bone disease," but he discussed the possibility that Claimant may have a metabolic bone disease unrelated to his accident and recommended Claimant see an orthopedic oncologist. (EX-3, p. 13).

Dr. Lea recommended against performing discography, which would not be helpful in Claimant's case. Likewise, Dr. Lea advised against surgery, because he "did not see any type of finding on the diagnostic study reports or on his physical exam to support a major work related surgical diagnosis." (EX-3, pp. 13-14). He concluded Claimant could immediately return to his prior work without any permanent activity restriction because "...I do not believe this individual is any more or less disabled

than he was prior to the time of his 4/3/00 injury/event at work." Dr. Lea concluded Claimant reached maximum medical improvement regarding the cervical and lumbar injuries "by three months post-injury." (EX-3, p. 14). Dr. Lea found Claimant "essentially has no assignable impairment as a result of the alleged cervical and lumbar complaints." (EX-3, p. 15).

Dr. George A. Murphy, M.D.

On February 28, 2002, Dr. Murphy evaluated Claimant at the request of Claimant's attorney. He noted Claimant's injury on April 3, 2000, and observed Claimant "continues to have neck pain at this time," with "occasional radiation into his shoulders." He also noted Claimant initially experienced low back pain which resolved. He indicated Claimant complained of a "slight knot on the side of his head." (CX-8).

Dr. Murphy's examination revealed a "very slight prominence" to the left side of Claimant's forehead, no neck spasm, and "very slight restriction from full motion in extension and rotation." Neurologically, Claimant was "grossly intact." Id.

Dr. Murphy examined the August 29, 2000 MRI that revealed "mild bulging at C4-C5 and C5-C6." He noted, "This would not be expected in a 23 year-old." Id.

Dr. Murphy diagnosed "cervical disc injury with bulging at C4-C5 and C5-C6." He concluded Claimant required "no specific treatment at this time," but did require permanent restrictions. He restricted Claimant from "heavy lifting at any time." Further, he found that Claimant should avoid lifting, climbing vertical ladders, and repetitive activities above shoulder level. Dr. Murphy assigned a 5% "whole body permanent impairment as a result of the injury." Id.

Medical Records of Leonard J. Chabert Medical Center

On June 11, 2001, Claimant was treated at the Emergency Room at Leonard J. Chabert Medical Center for injuries sustained in a motor vehicle accident. He complained of head and neck pain and was diagnosed with neck pain. Pain and muscle relaxant medications were prescribed. (EX-7).

Crescent City Physical Therapy Functional Capacity Evaluation

From April 1, 2002 to April 5, 2002, a functional capacity evaluation was performed on Claimant at Crescent City Physical Therapy during eight hours a day for five days. The report

indicated Claimant "appeared to give maximum effort and did not show any signs of symptom magnification. [Claimant] is functional at medium level work activity and was consistent over the five days of testing." The report recommended Claimant could return to "medium level work," but "would not meet his previous work level as a laborer in a shipyard." (CX-9, p. 1). There is no indication of the exertional level of Claimant's previous work.

The Vocational Evidence

Allen Crane

On February 6, 2002, Mr. Crane, who was accepted as an expert in the field of vocational rehabilitation counseling, met with Claimant. (Tr. 172). Relying on Claimant's educational background, medical records, employment records, and his interview with Claimant, Mr. Crane concluded Claimant has "skills in the mechanical/industrial area, as well as skills transferrable to sedentary to light functions such as sales/clerical functions." (Tr. 174).

Based on his experience in the Houma, Louisiana area, Mr. Crane considered someone with Claimant's skills, education, and abilities "a fairly highly employable person, and one that is employable even if I were restricted to sedentary and light jobs." (Tr. 176). Based on his review of the deposition of Dr. Manale and the medical records of Drs. Cenac, Trahant, Manale and Flood, Mr. Crane opined that the medical opinions "do not prohibit [Claimant] from returning to work at [Employer] as a roustabout," which is the best vocational option for Claimant. (Tr. 177-178).

If Claimant did not choose to return to work as a roustabout, Mr. Crane believed Claimant had vocational options and could be, among other things, an auto parts sales clerk, a meter reader, a laborer, a janitor, a shoe salesman, a grounds caretaker, a forklift operator, a deliverer, a driver, a maintenance scheduler and a protective signal operator (Tr. 179-180; EX-9, p. 10).

On February 15, 2002, Mr. Crane provided Employer a report based on a labor market survey that Mr. Crane conducted from February 8, 2002 to February 14, 2002 in the Houma area where Claimant resided. (Tr. 182). He indicated jobs appropriate for Claimant within Claimant's demand level were currently available in the area. Specifically, a full-time position as a meter reader was available at $7.44 per hour. A full-time job as a garbage truck driver was available at $8.00 per hour. A counter

clerk position at an automobile parts store was available at $6.00 per hour plus commission. A full-time route salesperson job was identified with a guarantied starting salary of $100.00 per day until the worker becomes commissioned, when the typical salary is $11.53 per hour for 12-hour days. A job as a driver was available with a starting salary of "approximately" $7.00 per hour. A position as a shuttle bus driver was available at $5.50 per hour until the employee obtains a CDL license, when the employee's salary would range from $6.50 per hour to $8.00 per hour. (EX-9, pp. 11-14).

On May 22, 2002, based on a supplemental labor market survey, Mr. Crane notified Claimant of available full-time jobs in the Houma area within Claimant's restrictions and offered assistance to Claimant in the form of job seeking skills assistance. (Tr. 185; EX-9, p. 1). A job as a courier driver for Airborne Express was available, with a starting salary of $7.50 per hour. Employment as a shuttle bus driver for the Terrebonne Association for Retarded Citizens was available at a "starting wage of $5.50 per hour until CDL obtained, then $6.50 to $8.00 per hour." A job as route salesman for Schwann's Frozen Food was available at $100.00 per day until the employee is commissioned, after which "the typical average is $11.53 per hour for 12-hour days." A job as a counter clerk for O'Reilly Auto Parts was identified and provided a starting salary of $6.00 per hour. A meter reader position with Terrebonne Parish Utilities was available at a starting wage of $7.44 to $11.45 per hour. A hardware sales position was available at Sears, which would only disclose the starting wage upon interview. A sales position with Frost's Lumber & Ace Hardware was available with a starting wage of "$6.50 per hour or higher." (Tr. 187-194; EX-9a, pp. 2-5).

Mr. Crane was unable to confirm whether Claimant attempted to apply for these positions, and was also unable to obtain copies of any applications submitted by Claimant to prospective employers; however, he stated Claimant was generally cooperative. (Tr. 185-187, 209-210). Nonetheless, Mr. Crane opined Claimant's results during his academic testing of Claimant were not accurate, given Claimant's education and background. (Tr. 215). Hypothetically, Mr. Crane testified Claimant would not be able to perform overhead work if he were restricted from such work in February 2002. (Tr. 201).

The Contentions of the Parties

Claimant maintains the parties stipulated to his accident. He asserts Dr. Cenac's opinion that he could return to full-duty work is tainted because he did not possess Claimant's cervical

MRI report indicating two bulging discs. Claimant argues that the Crescent City functional capacity evaluation demonstrated his inability to return to his prior work with Employer. Claimant argues Section 33(g) is inapplicable because Claimant's motor vehicle accidents were not sustained in the course and scope of his employment. Alternatively, Claimant argues that his automobile accidents caused a temporary exacerbation of his work-related symptoms. Lastly, Claimant asserts any factual discrepancies are from a lack of memory and intelligence rather than malingering, and his inability to correctly respond to interrogatories was merely harmless error that did not prejudice Employer.

Employer maintains Claimant did not suffer any injury to the cervical or lumbar regions. Employer asserts Claimant does not experience any disabilities because Claimant admitted he is able to return to medium duty employment, including his previous employment with Employer, as well as the available jobs within his geographic area. Employer argues there are no medical expenses outstanding because Claimant stipulated to the payment of all outstanding medical expenses and provided no evidence of a prescription or request or approval of Employer regarding other treatment.

Employer asserts Claimant's motor vehicle accident settlements were entered into without Employer's approval, thereby precluding Claimant's right to recover benefits compensation under Section 933(g). Alternatively, Employer suggests the motor vehicle accidents should be considered intervening causes that terminate its liability. Lastly, Employer challenges Claimant's credibility, seeking dismissal of the claim with prejudice, awarding costs and attorney fees, or alternatively denying all of Claimant's claims.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Procedural Issues

1. Motion to Dismiss and Sanctions

Employer avers the undersigned should dismiss the instant claim and impose sanctions, including dismissal of the claim with prejudice, costs, and attorney's fees, for Claimant's "refusal to accurately respond to or supplement Employer's discovery requests." Claimant contends his failure to disclose relevant information was "inconsequential," and "did not prejudice Employer."

The Board has noted that "dismissal is an extreme sanction which is permissible only where the plaintiff has willfully disobeyed a court order or has persistently and continually failed to prosecute his complaint." Twigg v. Maryland Shipbuilding and Dry Dock Co., 23 BRBS 118 , 121 (1989). In determining whether dismissal is appropriate, the judge should consider the following four criteria:

> (1) the degree of personal responsibility on the part of plaintiff;
>
> (2) the amount of prejudice to the defendant caused by the delay;
>
> (3) the presence or absence of drawn out history of deliberately proceeding in a dilatory fashion; and
>
> (4) the effectiveness of sanctions less drastic than dismissal.

Id. (citing Davis v. Williams, 588 F.2d 69, 70 (4th Cir. 1978)).

After consideration of the foregoing factors, I find that dismissal of this matter is not appropriate. Claimant has not willfully disobeyed a court order, nor has he persistently and continually failed to prosecute his complaint. Furthermore, Employer has not established it was caused delay or was

prejudiced by Claimant's actions. Thus, Employer's contention is without merit.

Alternatively, 29 C.F.R. § 18 provides:

> (a) General Powers. In any proceeding under this part, the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearings, including, but not limited to the following:
>
> (8) Where applicable, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts.

Employer relies on Rule 37 of the Federal Rules of Civil Procedure, "Failure to Make Disclosure or Cooperate in Discovery; Sanctions," for its position that "incomplete disclosure and evasiveness is considered ... a failure to respond, resulting in sanctions to include expenses incurred in pursuing discovery, attorney's fees and, ultimately dismissal of the claim."

Employer's reliance on Rule 37 in the instant matter is misplaced. Employer never applied for nor was granted an order compelling disclosure or discovery. Rule 37(a)(4)(A) provides reasonable expenses incurred in making the motion, including attorney's fees, shall be required under certain circumstances "[i]f the motion is granted or requested discovery is provided after the motion was filed...." Likewise, 37(b)(2) provides for sanctions for failing to comply with an order to provide or permit discovery. No such order has issued in this matter. Consequently, Employer's argument is without merit. See also 29 C.F.R. §18.6(d)(2) (2001).

2. Settlement under Section 33(g)

Employer argues that Claimant's settlements arising from his motor vehicle accidents in June 2001 and February 2002 occurred "to the detriment of Employer," thus precluding Claimant's recovery under Section 33(g) of the Act. Section 33(g) provides in pertinent part:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the

> employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative).
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

The provisions of Section 33 apply where a third party is liable in damages **for the same disability** or death **for which compensation is sought**. Goody v. Thames Valley Steel Corp., 31 BRBS 29 (1997) (citing United Brands Co. v. Melson, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979)); O'Berry v. Jacksonville Shipyards, Inc. (O'Berry I), 21 BRBS 80 (1993), on recon. O'Berry II, 22 BRBS 430 (1989); Chavez v. Todd Shipyards Corp., 27 BRBS 80 (1993), aff'd on recon. en banc 28 BRBS 185 (1994). In the present matter, the third-party tortfeasors were not liable in damages for the same disability for which Claimant's compensation is sought, i.e., a work-related injury of April 3, 2000. Accordingly, Section 33 of the Act is inapplicable and Employer's argument is without merit.

B. Claimant's Credibility

The administrative law judge has the discretion to determine the credibility of a witness. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); See also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972); Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999).

I found Claimant's hearing testimony generally unequivocal and credible. He at times provided reluctant testimony and inconsistencies with his prior deposition testimony that certainly detracts from his overall demeanor and believability. I did not observe any deliberate efforts at deception or dishonesty. Overall, the multiple inconsistencies detract from the weight to be accorded Claimant's testimony and claim in general.

Employer contends Claimant's testimony is unreliable because he denied in his October 2001 deposition that he sustained a neck injury in the 1997 motor vehicle accident, while medical records indicate he was treated for posterior neck pain at a hospital. Further, Employer notes Claimant failed to disclose the accident to Employer upon applying to work for Employer. Likewise, Employer complains that Claimant failed to disclose the 1997 injury to his treating physicians.

Given the passage of time between the 1997accident and his deposition, it is not unreasonable for Claimant to inadvertently overlook his 1997 neck injury, which was otherwise reported in Claimant's medical records; however, Claimant also failed to disclose his neck complaints regarding his February 2002 accident to Dr. Murphy. Such a failure to disclose may have affected Dr. Murphy's opinion of permanency in disability and restrictions. Accordingly, as noted below, I discount Dr. Murphy's favorable opinions in both areas because Claimant failed to report his February car accident and its effects, if any.

Claimant also failed to disclose the February 2002 car accident in his April 9, 2002 response to Employer's supplemental interrogatories. There, he was specifically asked, "Please state whether you have been involved in any prior or subsequent motor vehicle accident." Further, at the hearing on this matter, Claimant denied involvement in any accident or sustaining any injury after June 11, 2001 until Employer pressed the issue. (Tr. 132). Claimant's attorney stated, "... all I can tell the Court is that the first time I heard about this accident was when he got up on the stand and told us about it...." (Tr. 235).

As a result of the February 2002 accident, Claimant acknowledged he was treated for neck pain, and also concedes he accepted $900.00 as a settlement for personal injuries. Counsel for Claimant's explanation is that "Obviously, Claimant was not hurt seriously and returned to his pre-auto accident condition shortly after the accident." (Claimant's Post-hearing Reply Brief, p. 2). This explanation is not persuasive because his harm was serious enough to seek treatment and accept a settlement for damages. Moreover, there is no medical opinion of record supporting Claimant's position that he returned to his pre-auto accident condition shortly after the accident.

The thrust of this matter revolves around Claimant's cervical injuries and his subjective complaints of pain, which find little objective support in the record. His failure to disclose his cervical injuries as a result of the February 2002 accident to Dr. Murphy or to Employer is simply beyond

explanation. For this reason alone, I find Claimant's testimony regarding the events after his February 2002 car accident entitled to little weight.

Employer also asserts that Drs. Lea and Cenac found that Claimant exhibited nearly every positive Waddell finding that you can have in the cervical and lumbar regions to the point of borderline absurdity. Likewise, Employer relies on Mr. Crane's conclusion that there was evidence of inaccurate test performance indicating Claimant's untruthfulness.

Counsel for Claimant responds that Claimant is not deceptive but "dumb." I did not view Claimant as slow or confused. He responded to questions adequately when pressed. Drs. Cenac and Lea obviously observed exaggeration, magnification of symptoms and inconsistent and contradictory responses which further erode Claimant's trustworthiness. However, Claimant's later FCE efforts belie the earlier inconsistencies found by Drs. Cenac and Lea.

Notwithstanding the foregoing, Dr. Manale based his opinions on Claimant's history and presentation. Dr. Manale continued treating Claimant on his subjective complaints. However, before any subsequent car accidents, Dr. Manale detected objective findings of spasm which formulated his continued treatment of Claimant and his opinion of causation. Thus, I further find that the medical evidence provides support for a finding of Claimant's injury and continued symptomatology which bolsters Claimant's credibility.

In light of the foregoing, I find and conclude that Claimant's failure to disclose relevant information impugns his credibility of events thereafter. However, I am not so persuaded by the alleged exaggeration of symptoms or magnification of signs which are discussed below in more detail. Only Drs. Cenac and Lea opined about Claimant's inconsistent responses at a one-time examination. As more fully discussed, I have placed more probative value on the medical opinions of Dr. Manale and therefore discount the observations of Drs. Cenac and Lea, who did not treat Claimant nor examine Claimant as frequently as Dr. Manale.

I conclude that Claimant's history and testimony upon which Dr. Manale based his medical opinions were generally unequivocal and credible.

C. Intervening Cause

Employer argues Claimant's subsequent automobile accidents in June 2001 and February 2002 are intervening causes that terminate its liability. Claimant argues the accidents temporarily exacerbated his work-related symptoms.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT) (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(If an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is the result of an intervening cause such as the employee's intentional or negligent conduct, the employer is relieved of liability attributable to the subsequent injury. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); Cyr v. Crescent Wharf & Warehouse Co., supra; Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); Marsala v. Triple A South, 14 BRBS 39, 42 (1981) (the intentional or negligent conduct of a third party may constitute an intervening cause of a subsequent injury occurring outside work so as to relieve the employer of liability for that injury); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Moreover, if there has been a subsequent non work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's condition was caused by the subsequent non work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

In the present matter, Claimant's June 2001 and February 2002 car accidents were the result of third-party negligence, which caused the accidents. Moreover, there is no allegation or evidence that Claimant's work-related injury caused the accidents. Accordingly, I find Claimant's accidents after his work-related injury were not the natural or unavoidable result of Claimant's work-related injury. Thus, the intentional or negligent conduct of the third parties may constitute an

intervening cause of a subsequent injury occurring outside of work to relieve Employer's liability for the injuries.

Employer argues Claimant's subsequent automobile accidents function as intervening causes of his condition, yet offers no authoritative support for its position. In Wright v. Connolly Pacific Company, 25 BRBS 161 (1991) aff'd mem. sub. nom. Wright v. Director, OWCP, No. 92-70045 (9th Cir., October 6, 1993), the Board affirmed an administrative law judge's decision that an employer was relieved of liability for the claimant's condition after subsequent automobile accidents, which the Board agreed were supervening intervening causes of any subsequent disability.

In Wright, the claimant sustained a cervical injury on February 3, 1984 and subsequently became involved in two automobile accidents occurring on February 27, 1985 and December 23, 1985, respectively. The claimant's first automobile accident involved an altercation with the police, resulting in the use of a night-stick against the claimant's chin to pull his head back. After the accident, the claimant sought treatment with a physician, who opined that the claimant suffered cervical disc radiculopathy related to his work-related accident. Based on normal results of a subsequent myelogram, another physician concluded that the claimant's condition after the automobile accident was unrelated to his work-related injury and probably caused by his automobile accident. Id. at 162.

The second automobile accident in Wright occurred after the claimant recovered from his earlier accident and returned to his usual work. The claimant ran his truck into a tree with such severity that the police had to pry open claimant's jammed door to remove him from the wreckage. Three months after the accident, a CT scan was performed, revealing for the first time a disc protrusion requiring surgery. A physician testified that the herniated disc would have been evident on the claimant's earlier myelogram, before the second accident, had it existed at that time. After surgery, the claimant was permanently precluded from returning to his prior relevant work. Id. at 162-163.

The Board in Wright found that, because it was undisputed that claimant suffered a work-related neck injury, the administrative law judge properly found that claimant established a **prima facie** case pursuant to Section 20(a). The Board affirmed the administrative law judge's decision that the employer produced substantial evidence sufficient to rebut the 20(a) presumption based on: (1) claimant's full recovery and return to his usual work subsequent to the period of temporary total disability associated with the first car accident; (2) the

severity of the second auto accident; (3) the fact that the first objective evidence of claimant's cervical disc pathology appeared on a CT scan taken 3 months later; and (4) a physician's hearing testimony that the auto accidents caused the claimant's condition. Id. at 165-166.

In the present matter, according to Dr. Manale, Claimant had reached maximum medical improvement from his work-related injury prior to his automobile accidents; moreover, Claimant stated he was feeling better prior to and the day of his June 2001 accident, but "not 100 percent. About 50, 60 percent." (EX-14, p. 5; Tr. 132). Thus, the record establishes that, prior to the first accident, Claimant still felt pain. Although Claimant experienced more pain after his accidents, there is nothing in the record establishing that the accidents were severe enough to worsen claimant's work-related condition. Further, the first objective evidence of Claimant's disc pathology was found in October 2000, roughly 8 months before Claimant's automobile accident in June 2001. Claimant's uncontroverted testimony indicates his increased pain from his auto accident was fleeting and nothing more than a temporary exacerbation.

Moreover, no physician of record offers any opinion that Claimant's condition was worsened or caused by his automobile accidents. Rather, the only medical opinions of record unquestionably establish Claimant sustained cervical and lumbar injuries while working for Employer. Although Dr. Manale noted complaints of more neck pain after Claimant's June 2001 automobile accident, he specifically stated in his deposition that he did not know what happened after Claimant's June 2001 car wreck. However, Dr. Manale unequivocally concluded Claimant suffered a cervical sprain and head injury and injury and sprain of his lumbar spine attributable to the work-related injury. (CX-3, pp. 3, 10).

Accordingly, I find that Employer offered speculation, and failed to produce substantial evidence of an intervening cause sufficient to rebut the 20(a) presumption. See, e.g., Buchanan v. International Transportation Services, 33 BRBS 32, 38 n.6 (1999)(If a claimant alleged a work-related injury and the employer sought to establish the existence of a later traumatic event that is the cause of the claimant's disability, the employer would bear both the burden of production and of persuasion in order to escape liability).

Nonetheless, assuming arguendo that Employer established substantial evidence sufficient to rebut the 20(a) presumption, a review of the entire record indicates that the preponderance of

probative evidence establishes that the automobile accidents were not supervening events.

The Fifth Circuit has set forth "somewhat different standards" regarding establishment of supervening events. Shell Offshore, Inc. v. Director, OWCP, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997). The initial standard was set forth in Voris v. Texas Employers Ins. Ass'n, which held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. 190 F.2d 929, 934 (5th Cir. 1951). Later, the court in Mississippi Coast Marine v. Bosarge held that a simple "worsening" could give rise to a supervening cause. 637 F.2d 994, 1000 (5th Cir. 1981). Specifically, the court held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." Id. I find that Employer failed to establish a supervening cause under either standard.

The record indicates Claimant's work-related injury was not overpowered and nullified by his subsequent accidents. In addition to the preceding reasons for concluding Employer failed to rebut the Section 20(a) presumption, Claimant treated with Dr. Manale only once after the June 2001 accident, despite his complaints of increased pain immediately after the June 2001 accident. Dr. Manale's July 12, 2001 diagnosis included cervical disc displacement and lumbar neuritis, while the May 16, 2001 diagnosis included cervical disc displacement, lumbar neuritis, and headache. Further, Dr. Manale found no trigger points requiring the injection of Marcaine as he did on the May 16, 2001 examination before the June 2001 accident. Thus, the record indicates Dr. Manale actually observed fewer complaints after the June 2001 accident.

Nevertheless, Dr. Manale observed restricted range of motion of less than 20 degrees in any plane with spasm on July 12, 2001. When Dr. Murphy evaluated Claimant in February 2002, after both subsequent automobile accidents, he noted that Claimant experienced neck pain, but observed "no spasm in the neck" and "a very slight restriction from full motion in extension and rotation." Further, Dr. Murphy did not prescribe medications for pain. Thus, the medical evidence of record is consistent with Claimant's testimony that his increased neck pain did not last long. Accordingly, I find that Claimant's work-related injury was not overpowered or nullified by his subsequent automobile accidents in June 2001 and February 2002. Rather, the record substantially establishes Claimant suffered a temporary

exacerbation of his work-related symptoms.

Likewise, the record does not establish that Claimant's automobile accidents were supervening causes that worsened his condition. In addition to the above reasons, Claimant stated he was released by Dr. Manale to cut grass in May 2001. His uncontradicted testimony at the hearing and at his deposition indicates Claimant mowed neighbors' lawns until well after his June 2001 accident. Further, Dr. Manale testified in his January 2002 deposition that he believed Claimant could return to work cutting grass or house painting.

After Claimant's February 2002 accident, Dr. Murphy placed permanent restrictions upon Claimant and assigned a 5% whole body impairment; however, I find that his opinion regarding the permanency of Claimant's condition is entitled to little probative value. He evaluated Claimant only once at Counsel for Claimant's request, and he relied on Claimant's August 2000 MRI to conclude Claimant must be permanently restricted and impaired. Dr. Manale previously interpreted that MRI and was not sure if it established Claimant's bulging discs were causing his pain.

I find Dr. Manale's opinion more persuasive because he was in a superior position to render a well-reasoned opinion as Claimant's treating physician. Further, he was deposed and was subject to cross-examination, while Dr. Murphy's opinion appears in a brief, one-page report. Moreover, Dr. Manale had the benefit of a more complete medical history when he offered his deposition testimony that there is nothing in Claimant's medical record which constitutes a contraindication to return to work of any sort, depending on his complaints of pain.

Further, Claimant testified at the hearing, after both automobile accidents, that he could perform all of the jobs listed on Mr. Crane's vocational reports. Likewise, he believed he could have performed those jobs "at least since May 11, 2001," but did not apply for such jobs because Dr. Manale only released him to cut grass. Thus, Claimant's uncontroverted testimony indicates his condition was the same before both accidents as it was after both accidents. His testimony is consistent with the medical opinions of record that establish Claimant's condition was not worsened by his subsequent minor automobile accidents.

From the foregoing, I find and conclude Claimant's subsequent automobile accidents were not supervening injuries. Accordingly, Employer is not relieved of its liability for Claimant's work-related injuries.

Alternatively, Employer appears to argue that Claimant's 1997 automobile accident, which occurred prior to his April 2000 work-related accident, may have caused Claimant's injury, which is thus non-compensable. Employer offers no authoritative support for its argument. The medical evidence of record indicates Claimant experienced cervical pain after his 1997 automobile accident; however, no evidence of record indicates the accident resulted in a permanent condition of any sort. The record establishes Claimant was treated once for the 1997 accident and did not seek medical treatment again for that accident. After Claimant's April 2000 work-related injury, Claimant sought continuous treatment for and was prescribed pain relievers and medication for cervical and lumbar complaints. Employer's argument is thus specious and without merit. Nonetheless, if Claimant's 1997 accident resulted in a permanent condition, Employer's argument is misplaced, because the employer takes the employee as he finds him, even if he has been previously injured, and aggravation of the pre-existing condition can constitute an "injury" under the Act. Bludworth, supra. Thus, I find and conclude Claimant's cervical and lumbar complaints were caused or aggravated by his work-related injury in April 2000.

Lastly, Employer also appears to argue that the physicians of record did not have the benefit of Claimant's history of his prior 1997 auto accident, thereby rendering their opinions of little value. However, I find that Claimant's failure to reveal his 1997 automobile accident was not intentional and was otherwise reported in his medical record. Claimant stated that he did not think the accident was "major," which is consistent with the record evidence. There is no evidence that Claimant's 1997 auto injury, which involved no vehicle damage, caused any permanent condition. Rather, Claimant's medical records indicate that X-rays of his cervical spine were reported as "normal." Specifically, no acute fracture or dislocation were observed, and his soft tissues were reported to be "unremarkable." Claimant was instructed to use ice, moist heat, rest, ibuprofen, and flexeril for the accident. Further, Claimant, who was instructed to follow-up with a physician within a week if his condition did not improve, did not follow-up with any physician regarding the 1997 auto accident.

Consequently, the record establishes that Claimant's 1997 automobile accident, which occurred three years prior to his work-related accident, caused temporary complaints of pain and stiffness which resolved. I thus find that the lack of Claimant's history regarding the 1997 auto accident did not affect his medical treatment for his work-related injury.

Accordingly, I find the lack of Claimant's history concerning the 1997 auto accident does not diminish the probative value of the medical opinions of record.

D. Nature and Extent of Disability

The parties stipulated that Claimant suffered a compensable injury on April 3, 2000; however the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

E. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The date Claimant reached maximum medical improvement is at issue. Based on Claimant's testimony and the medical evidence of record, I find and conclude that Claimant reached maximum medical improvement with respect to his cervical and lumbar injuries on May 16, 2001, consistent with the opinion of Dr. Manale.

April 3, 2000 - July 24, 2000

Prefatorily, it is well-settled that the opinions of a treating physician are entitled to greater weight than the opinions of non-treating physicians in administrative

proceedings. See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000). Dr. Flood was Claimant's treating physician until July 2000, when Dr. Manale replaced him as Claimant's treating physician upon Dr. Flood's retirement.

On April 3 and 4, 2000, Claimant initially treated with Employer's physician, Dr. Marcello, who believed Claimant's condition was caused or aggravated by Claimant's employment activity. He returned Claimant to sedentary work. On April 26, 2000, Claimant began treating with Dr. Flood, who found remarkable paralumbar spasms, back pain, severe headaches, and evidence of cervical and lumbar syndrome. Dr. Flood placed Claimant on total temporary disability status at that time. On June 23, 2000, Dr. Flood again opined Claimant was temporarily, totally disabled pending an FCE and follow-up with Dr. Manale.

Meanwhile, on May 31, 2000, Dr. Cenac evaluated Claimant, finding multiple Waddell signs and no evidence of spasm. Dr. Cenac concluded Claimant could immediately return to his prior job without restrictions. However, on June 2, 2000, Dr. Trahant concluded Claimant suffered a cervical strain, a cerebral concussion, and post-traumatic headaches. He opined Claimant should be able to return to work at full duty with 3-4 weeks. Dr. Trahant never followed up with Claimant.

Thus, until July 25, 2000, when Dr. Manale began treating Claimant, Dr. Cenac was the only physician of record who opined Claimant could return to work without restrictions. I find his opinion entitled to diminished probative value as he only evaluated Claimant on one occasion. Moreover, the record is silent regarding whether the results of the CT scan and lumbar MRI that Dr. Cenac ordered were ever forwarded to him or otherwise included in forming his opinion. I find Dr. Trahant's conclusion that Claimant might return to work in 3-4 weeks after his evaluation is also entitled to diminished weight because he never followed-up with Claimant. I find Dr. Flood's opinion persuasive and supported by the record and consistent with the opinions of Drs. Trahant and Marcello, who opined Claimant could only return to sedentary work.

Therefore, I find Claimant could not return to his former occupation by July 25, 2000, when Dr. Manale began treating Claimant. Accordingly, I find Claimant was temporarily and totally disabled from April 3, 2000 until July 24, 2000.

July 25, 2000 - May 15, 2001

Dr. Manale was Claimant's treating physician until July 2001. He found a variety of complaints and symptoms that compelled him to keep Claimant on temporary total disability status from his prior work before either of Claimant's subsequent June 2001 and February 2002 car accidents. On July 25, 2000, Dr. Manale found Claimant had markedly restricted range of motion in all areas, with tenderness in the cervical spine mostly at C4-5 and the associated paralumbar regions. Dr. Manale also noted complaints of headaches and restricted motion in his neck. On August 29, 2000, Dr. Manale found Claimant's symptomatology continued with both neck and back pain. He otherwise found no new findings of the cervical spine, and extended Claimant's total disability status until October 3, 2000, when he found a questionable spasm and 80% normal cervical motion. At that time, Dr. Manale observed small, bulging discs on Claimant's MRI. He stated it was "a good bet" that the discs were caused by Claimant's work injury. Although Dr. Manale concluded Claimant's MRI was not a contraindication of returning to work, he kept Claimant on total disability status because he was "waiting for symptoms to quiet down."

By November 28, 2000, Dr. Manale noted Claimant still complained of neck pain made worse by cold weather, and observed "barely 20 degrees" of motion in any plane. He concluded surgery might be an option if Claimant did not improve. New complaints of numbness in Claimant's arms and legs were noted on January 10, 2001. On January 22, 2001, Dr. Manale noted Claimant complained of more neck pain, but did not complain about his back. He found Claimant's cervical motion restricted to "less than 50 percent in all planes by spasm."

On March 19, 2001, Dr. Manale noted Claimant desired surgery, based on the opinion of a "Dr. Lee," who does not otherwise appear in the record. Dr. Manale concluded a discogram was preferable to Claimant's choice of surgery, because he was not sure Claimant's pain was coming from Claimant's minor bulging discs. Dr. Manale placed "common sense" restrictions on Claimant, including a prohibition of lifting more than 20 pounds.

On April 16, 2001, Dr. Manale found objective evidence of pain, including spasms, when he treated Claimant for his continuing complaints of persistent pain. Likewise, on May 16, 2001, Dr. Manale found objective signs of pain, including paracervical tenderness, mild palpable spasm, and a trigger point, in which he injected Marcaine.

On May 16, 2001, Dr. Manale concluded that Claimant reached MMI and he might release Claimant to return to work at his

previous occupation in the shipyard because there was "nothing" in Claimant's medical records that constituted a contraindication. Moreover, Dr. Manale did not desire to perform surgery, and stated "there was some discussion about a discogram and looks like that faded away."

Meanwhile, Dr. Lea evaluated Claimant on April 18, 2001 and found a skewed pain profile with every positive Waddell sign. Dr. Lea advised against surgery or a discogram and concluded Claimant could return to his prior occupation without restriction. Dr. Lea concluded Claimant reached MMI by three months post-injury.

Thus, from July 25, 2000 to May 16, 2001, prior to Claimant's subsequent June 2001 and February 2002 car accidents, only Drs. Manale and Lea evaluated or treated Claimant and offered an opinion regarding MMI. I find Dr. Manale's opinion persuasive and entitled to greater weight as Claimant's treating physician. His opinion is further buttressed by the record, which indicates Claimant's complaints of back pain improved and eventually resolved during Dr. Manale's treatment in which he was awaiting Claimant's symptoms to "quiet down." Moreover, the results of Claimant's 5-day April 2002 FCE indicating Claimant may return to medium level work reveal that Claimant appeared to give maximum effort and did not show any signs of symptom magnification. The FCE thus belies Dr. Lea's conclusion that Claimant's complaints of pain were "borderline absurd" when he saw Claimant once for an evaluation. Therefore, I find Claimant reached MMI on May 16, 2001.

Accordingly, all periods of disability prior to May 16, 2001 are considered temporary under the Act. Therefore, Claimant is entitled to temporary total disability compensation benefits from April 3, 2000, the date of his injury, until May 15, 2001.

May 16, 2001 - February 14, 2002

a. Claimant's Low Back Injury

Thereafter, Claimant's condition became permanent. Claimant stated his back pain "slacked" by May 16, 2001, and by October 2000 he stated his back was "fine." Moreover, Dr. Murphy's February 2002 report indicates Claimant's back pain had resolved. Dr. Manale opined that such a recovery means Claimant no longer has any restrictions with respect to his low back. Accordingly, Claimant's testimony and the medical evidence of record support the finding that Claimant no longer suffers any restrictions with respect to his low back.

b. Claimant's Cervical Injury

Nonetheless, Claimant's complaints of cervical pain persisted after May 16, 2001. On May 16, 2001, Dr. Manale's records indicate Claimant's medication would be refilled and he was reminded "to try to minimize reaching and overhead activity." (CX-2, p. 2).

Those recommendations are consistent with the March 2001 "common sense" restrictions Dr. Manale placed on Claimant, including prohibitions from looking up and down, working with his arms above shoulder level to avoid making the pain worse, and lifting above 20 pounds. Claimant's job requirements for Employer included operating a pressure washer, shoveling sand, and carrying equipment weighing up to 80 pounds, "40 pounds apiece in both hands." Moreover, Claimant testified that 60% of his prior work was overhead work. The vocational expert testified that Claimant would hypothetically be unable to return to his former occupation with Employer if he could not perform overhead work. Accordingly, I find Claimant was unable to return to his prior work with Employer after May 16, 2001, because the requirements of his former occupation were beyond Dr. Manale's assigned restrictions.

Although Dr. Manale stated in his January 2002 deposition that he would have released Claimant to the heavy work of the shipyard as of May 16, 2001, he specifically stated his release would depend on Claimant's complaints of pain and other findings. A conclusion that Dr. Manale would have released Claimant to his prior work on May 16, 2001 is contrary to Dr. Manale's recommendation to avoid reaching and overhead activity. Further, Dr. Manale injected Claimant's trigger point with Marcaine and refilled Claimant's pain medication including Vicodin and Soma on May 16, 2001, indicating Claimant was still experiencing pain. Thus, I find Claimant could not have returned to his prior occupation on May 16, 2001 and was thus permanently and totally disabled.

By October 2001, Claimant stated he had been cutting grass part-time since Dr. Manale released him to such work. Claimant stated he believed he could perform all of the jobs he had performed in the past except his job with Employer and another job at Haliburton which also required heavy lifting. He also stated he could cut grass, paint houses and work as a meter reader. Claimant added that he could periodically lift his daughter, who weighs 35-40 pounds and could also periodically lift his mowing equipment. He testified that he often rolled his lawnmowers rather than lift them into his "low-ride" truck to mow

neighbors' yards. Claimant stated his lawnmowers weighed about 30 or 40 pounds, and one of the mowers "pulls by itself." Claimant further stated at his October deposition that he still suffered neck pain and "a little pain running through my [left] arm." (EX-14, p. 7). Because Claimant's activities did not include periodically lifting 80 pounds or overhead activity, and because Claimant still indicated he was suffering from cervical pain, I find Claimant remained totally disabled from returning to his prior occupation by October 2001.

In January 2002, Dr. Manale opined there is nothing in Claimant's record that constitutes contraindication to return to work of any sort; however, as previously discussed, Dr. Manale stated his decision to release Claimant to the heavy physical labor of the shipyard depended on Claimant's complaints of pain and other findings. Dr. Manale opined that Claimant could be released to work as a grass cutter or a house painter; however, he qualified his opinion with the comment that "it was probably one of those situations where I would say, well if you want to do it, go ahead and try." The record indicates Claimant tried and successfully performed cutting grass part-time. Although Claimant was thus released by Dr. Manale to cut grass, I find and conclude Claimant could not return to his former occupation with Employer, because the demands of his part-time grass cutting do not include the requirements of heavy lifting and overhead work necessary for Claimant's prior occupation. Thus, Claimant remained permanently and totally disabled as of January 2002.

In February 2002, Dr. Murphy opined Claimant should avoid heavy lifting at any time, frequent lifting, repetitive activities above shoulder level and climbing ladders. Further, Claimant stated Dr. Murphy advised him not to lift from 50 to 60 pounds. Based on Dr. Murphy's restrictions, Claimant stated he does not believe he can return to his prior job. Claimant's belief that he is precluded from his former occupation is buttressed by the April 2002 FCE that indicated Claimant may return to medium-duty work requiring 40-pound lifts. Accordingly, I find Claimant remained permanently and totally disabled from returning to his prior occupation for Employer.

I find Mr. Crane's opinion that Claimant was not prohibited from returning to his work as a roustabout, which he claimed was the best vocational option for Claimant, is entitled to little probative value. Mr. Crane opined that pressure washing a house entails "a similar type of physical demands" as pressure washing in a hold. However, he conceded he had never worked for Employer, nor did he provide a detailed job description from Employer in connection with this case. Further, Mr. Crane did

not query Employer's supervisors regarding the demands of Claimant's job. (Tr. 199). Moreover, there is no evidence that Mr. Crane investigated Claimant's performance cutting grass or pressure washing houses. Thus, his opinion is based on an assumption without substantial basis in the record. Therefore, I find that Mr. Crane's opinion that Claimant's best vocational option is to return to work as a roustabout is entitled to diminished probative value.

Moreover, Mr. Crane agreed that Claimant would no longer be able to perform overhead work if Claimant were restricted from performing such work. Inasmuch as the record establishes Drs. Manale and Murphy provided restrictions against overhead activity, Mr. Crane's opinion supports Claimant's contention that he may not return to his prior occupation for Employer, where 60% of his work was performed overhead. Thus, I find Claimant remained permanently and totally disabled until February 2002.

Further, although Claimant believed he could return to most of his prior jobs as early as May 11, 2001 and Dr. Manale released Claimant to cut grass on May 16, 2001, Employer failed to find suitable alternative employment until February 15, 2002, as discussed infra. Thus, because Claimant was unable to return to his prior employment, which included overhead activity and periodically lifting as much as 80 pounds, after reaching maximum medical improvement on May 16, 2001, he has established a **prima facie** case of total disability from May 16, 2001 through February 15, 2002, the date suitable alternative employment became available to Claimant. Accordingly, Claimant is entitled to permanent total disability compensation benefits from May 16, 2001 through February 15, 2002.

February 15, 2002 - May 21, 2002

Claimant was not released by either Dr. Manale or Murphy to return to his prior occupation. Likewise, the FCE indicates Claimant may not return to his prior job; however, the FCE does not discuss the requirements of Claimant's prior occupation, which diminishes the persuasiveness of the FCE concerning Claimant's inability to return to his prior occupation. Nonetheless, the FCE establishes Claimant may return to medium-duty work requiring 40-pound lifts. This is consistent with Dr. Manale's January 2002 conclusion that he might release Claimant to return to work as a grass cutter or a house painter, which are jobs that Claimant testified he performed. Further, Claimant stated that he believed he could perform all of the jobs identified on Mr. Crane's February 15, 2002 vocational report as of May 11, 2001.

Nevertheless, assuming the restrictions assigned by Drs. Manale and Murphy were never lifted, certain jobs on Mr. Crane's report remain within those restrictions and otherwise establish suitable alternative employment. Accordingly, Claimant's disability status became permanent partial, which entitles him to compensation benefits based on the difference between his pre-injury average weekly wage and his post-injury wage earning capacity from February 15, 2002 and continuing to present.

May 22, 2002 - present

On May 22, 2002, Employer again established suitable alternative employment on May 22, 2002. Mr. Crane again identified reasonably available jobs within Claimant's vocational abilities and within his geographic location. Accordingly, Claimant's disability status remained permanent partial, but entitles him to compensation benefits based on the difference between his pre-injury average weekly wage and his post-injury wage earning capacity from May 22, 2002 continuing through present and thereafter.

F. Suitable Alternative Employment

Having found Claimant successfully established a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes,

930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

On February 15, 2002, Mr. Crane considered Claimant's physical restrictions and provided a list of jobs available within Claimant's vocational profile in the geographical area where Claimant resides. All of the jobs he identified were no more than medium-duty work requiring no more than a semi-skilled level of ability. Claimant stated he could perform all of the jobs on Mr. Crane's report.

Since I find Claimant is capable of medium-level work and is restricted from repetitive lifting, overhead work and lifting more than 20 pounds, most of the jobs identified by Mr. Crane satisfy Employer/Carrier's burden. The meter reader job required maximum lifting of zero to five pounds, and was a job which Claimant had already performed and was experienced. Claimant stated he could perform this job, which was essentially "walking and reading meters." The garbage truck driver position was a light-work activity with frequent sitting and alternate standing. The job as a driver for the electric company involved a maximum lift of fifteen to twenty pounds. Likewise, the shuttle bus driver included maximum lifting of up to 20 pounds and required mostly sitting, with short periods of standing and walking. Although the shuttle bus driver position involved obtaining a commercial driver's license (CDL), it was not a requirement of immediate employment, and the employer would pay for the cost of training. Further, Claimant stated he applied for the job, believing he would eventually obtain his CDL.

The job as a route sales person was light to medium level of work, involving alternate sitting and standing, occasional walking and bending, and climbing in and out of the truck. However, that job required frequent lifting of five to ten pounds, and occasional lifting of up to 25 pounds. Because Claimant may be required to lift more than 20 pounds and engage in frequent lifting, this job is beyond Claimant's restrictions. Thus, the position as a route sales person does not qualify as suitable alternative employment. Likewise, the job as a counter clerk required frequent lifting, from which Claimant was restricted by Dr. Murphy. Accordingly, the jobs as a counter clerk and route salesman do not qualify as suitable alternative employment.

Thus, I find and conclude Employer/Carrier has established suitable alternative employment as of February 15, 2002. Claimant must demonstrate he used reasonable diligence to obtain alternative employment without success.

In this case, Claimant has failed to demonstrate a reasonably diligent job search. As previously mentioned,

Claimant testified he could return to medium-duty labor and could have performed all of the jobs identified in Mr. Crane's report at least since May 11, 2001. Likewise, Claimant stated he was capable of working as a shoe salesman and meter reader since November 2001. Nonetheless, Claimant stated he did nothing to apply for a job or to find employment until February 2002. He stated he submitted applications to Footlocker, Foot Action, Athlete's Foot, and Champs. Claimant's explanation for the delay was that he was "cutting grass." He added that cutting grass was "not full time, but something to keep money in my pocket."

Claimant's explanation is not persuasive because there is no record of any receipts or tax records indicating what Claimant earned cutting grass or how often he actually cut grass. Further, he earlier stated that he cut grass until "it got cold ... because the grass wasn't growing." Thus, Claimant's testimony does not account for the winter months prior to February or March 2002, including the holiday season which arguably affects retailers like Footlocker, Foot Action, Athlete's Foot, and Champs. Further, Claimant failed to search for other jobs for which he was qualified, including a position as a meter reader until he was provided the May 2002 report by Mr. Crane. Accordingly, I find Claimant has failed to establish a reasonably diligent job search.

Moreover, although Claimant testified he applied for the jobs identified by Mr. Crane in May 2002, he could not identify specific instances nor the people with whom he spoke. There is no indication Claimant followed-up with any of his prospective employers. Further, Claimant stated he applied for an Airborne Express job in Houma while the office to which he was to apply for the Houma delivery route was in Harahan. There is no record evidence of an Airborne Express office in Houma.

Consequently, I find Claimant has failed to demonstrate a reasonably diligent job search. Thus, I find that, given Claimant's age, education, industrial history and availability of employment, Claimant's residual wage earning capacity amounts to the average of the hourly wages of jobs reasonably available. See Avondale Industries, Inc. v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998)(averaging is a reasonable method for determining an employee's post-injury wage earning capacity); Louisiana Insurance Guaranty Association v. Abbot, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994)(averaging salary figures to establish earning capacity is appropriate and reasonable). The suitable jobs identified in Mr. Crane's February 15, 2002 report include:

Description:	Hourly Rate:
Meter Reader	$7.44
Garbage Truck Driver	$8.00
Driver	$6.00
Shuttle Bus Driver	$5.50

Accordingly, I find Employer established suitable alternative employment on February 15, 2002 paying $6.74 per hour, or $269.60 for a 40-hour work week. Taking into consideration the increases in the national average weekly wage between April 3, 2000, the date of accident, and February 15, 2002, the date Employer proved suitable alternative employment, $269.60 per week in 2002 equates to $250.22 in April 2000.[11] Thus, as Claimant's average weekly wage at the time of accident was $363.57, and his post-injury earning capacity is $250.22, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(c)(21), of $75.60.[12]

On May 22, 2002, Mr. Crane again considered Claimant's physical restrictions and provided a list of jobs available

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[11] Claimant was injured on April 3, 2000. The national average weekly wage from October 1, 1999 to September 30, 2000 was $450.64. Employer demonstrated suitable alternative employment on February 15, 2002. The national average weekly wage from October 1, 2001 to September 30, 2002 was $483.04, reflecting an increase of $32.40, or 7.19% from 2000. ($32.40 / 450.64 = .0719). Employer established suitable alternative employment at $269.60 per week on February 15, 2002, and discounting that amount by 7.19% results in 2000 earnings of $250.22. See Table of Compensation Rates as of October 1, 2001, Longshore Newsletter and Chronicle of Maritime Injury Law, vol. XIX, No. 7, Oct. 2001.

[12] Section 8(c)(21) provides:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21)(2002). Thus, Claimant's compensation benefits are computed by subtracting $250.22 from his average weekly wage of $363.57, yielding a difference of $113.35, which, when multiplied by .667, equals $75.60.

within Claimant's vocational profile in the geographical area where Claimant resides. Claimant stated he could perform all of the jobs on Mr. Crane's report. The record again establishes Claimant was not diligent in searching for employment, as discussed above.

Since Claimant is capable of medium-level work and is restricted from frequent lifting, overhead work and lifting more than 20 pounds, pursuant to the opinions of Drs. Manale and Murphy, most of the jobs identified by Mr. Crane satisfy Employer/Carrier's burden. A sedentary position as a courier driver was available, requiring alternate sitting, standing and walking, and lifting a maximum of 10 pounds. The driver position and the light-duty meter reader job were again identified. A hardware sales job was available, classified as light-duty with occasional sitting and stooping, frequent standing and walking, and a maximum lifting of 20 pounds. Lastly, a light-duty sales position was available requiring occasional sitting, stooping, frequent standing and walking, and a maximum lifting of 20 pounds.

Jobs outside of Claimant's restrictions included a position as a route salesman and a position as a counter clerk for reasons discussed above.

Thus, the jobs reasonably available to Claimant on May 22, 2002 included:

Description	Hourly Rate
Courier Driver	$7.50
Shuttle Bus Driver	$5.50
Meter Reader	$7.44
Hardware Sales	$6.50

Accordingly, I find Employer established suitable alternative employment on May 22, 2002 paying an average of $6.74 per hour, or $269.60 for a 40-hour work week. Taking into consideration the increases in the national average weekly wage between April 3, 2000, the date of accident, and May 22, 2002, the date Employer proved suitable alternative employment, $269.60 per week in 2002 equates to $250.22.[13] Thus, as Claimant's average weekly

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[13] See note 11, supra. Claimant was injured on April 3, 2000. The national average weekly wage from October 1, 1999 to September 30, 2000 was $450.64. Employer demonstrated suitable alternative employment on May 22, 2002. The national average weekly wage from October 1, 2001 to September 30, 2002 was

wage at the time of accident was $363.57, and his post-injury earning capacity is $250.22, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(c)(21), of $75.60.[14]

G. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American

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$483.04, reflecting an increase of $32.40, or 7.19% from 2000. ($32.40 / $450.64 = .0719). Employer established suitable alternative employment at $269.60 per week on May 22, 2002, and discounting that amount by 7.19% results in 2000 earnings of $250.22.

[14] See note 12, supra.

National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

1. Claimant's Entitlement to Chiropractic Benefits

In the present matter, Claimant seeks reimbursement for Dr. Manceaux's services. Dr. Manceaux treated Claimant from July 28, 2000 to October 20, 2000, and his final bill is dated October 24, 2000. (CX-5). Employer did not choose Dr. Manceaux. Claimant stated that he discussed Dr. Manceaux, a chiropractor/physical therapist, with Dr. Flood; however, there is no indication of record that Dr. Flood recommended Dr. Manceaux. There is no prescription or referral to Dr. Manceaux by Dr. Flood or any other physician of record. Dr. Manale treated Claimant from July 2000, after Claimant's original physician of choice moved away. That treatment was authorized and paid for by Employer. The record does not establish that Dr. Manceaux's treatment was under an emergency basis because Claimant was then treating with Dr. Manale. Further, Employer never refused or neglected to provide medical treatment prior to Claimant's decision to begin treatment with Dr. Manceaux.

Accordingly, Employer is not liable for Dr. Manceaux's chiropractic treatment of Claimant, who never received proper

Employer or DOL authorization for the treatment before seeking treatment.

Alternatively, on October 3, 2000, Dr. Manale noted Claimant was seeing a chiropractor, which "seems to be his best bet." Dr. Manceaux's records indicate that he diagnosed cervical and lumbar sprain and strain, and provided services. 20 C.F.R. § 702.404 specifically provides that reimbursable chiropractic services are limited to "treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." See Bang v. Ingalls Shipbuilding, Inc., 32 BRBS 183, 185 (1998)(although the Board noted an incongruity between the treatment of chiropractors and physical therapists, it held that 20 C.F.R. § 702.404 would be rendered meaningless if employer liability for chiropractic services other than spinal manipulation to correct a subluxation were permitted). However, the X-rays considered by the physicians indicate there is no evidence of any fracture, subluxation, or dislocation. Additionally, there is no indication from Dr. Manceaux that he manually manipulated Claimant's spine to correct a subluxation. Accordingly, I find Dr. Manceaux's chiropractic treatment is not compensable under Section 7.

Additionally, Dr. Manceaux's credentials indicate he is a physical therapist, which is consistent with Claimant's statement that Dr. Flood told him to see a physical therapist. See Barbour v. Woodward & Lothrop, Inc., 16 BRBS 300 (1984)(the Board held that a treating physician's prescription for biofeedback therapy was sufficient to demonstrate that such therapy was appropriate for the claimant's injury, and it was unnecessary for the claimant to show that the treatment was "medically accepted"). Nonetheless, Dr. Manceaux's records do not establish whether he provided services for physical therapy or chiropractic treatment. He provided the following services: (1) "72040;" (2) "72010;" (3) "97010;" (4) "97014;" (5) "98925;" (6) "99204;" (7) "99212;" and (8) "E0943." (CX-5). There is no further testimony or notation in the record indicating what these codes reflect in treatments or whether they would also be provided by a physical therapist who does not have a chiropractic license. Accordingly, I further find the record does not establish Dr. Manceaux's treatments are compensable as physical therapy under Section 7 of the Act.

2. Functional Capacity Evaluation (FCE) Reimbursement

Claimant also seeks reimbursement for the April 2002 FCE. Employer argues that the exam was completely unnecessary.

There is no medical evidence of record that establishes the April 2002 FCE ordered by Claimant's attorney is reasonable and necessary. Claimant argues Dr. Manale recommended that Claimant have [an FCE] to determine his limitations."[15] (Clt. Post-hrg. Br., p. 5). However, the record indicates Dr. Flood recommended an FCE in July 2000. (CX-2, p. 23). Dr. Manale, who continued treating Claimant upon Dr. Flood's retirement, questioned Dr. Flood's recommendation. He stated the recommendation might result in a premature FCE, which yields invalid results. Rather, Dr. Manale specifically observed that FCEs are advised under certain circumstances: (1) "... for some determination if the patient can work at all;" and (2) "if the patient is at [MMI] and there's nothing further to do and we need to assess his physical disability." Thus, after a patient reaches MMI, Dr. Manale stated he orders the FCE "if there's a question. If the man can't return to the previous occupation, then what could he do." (CX-3, p. 8).

Dr. Manale opined Claimant reached MMI on May 16, 2001, and did not order an FCE after that date. Likewise, Dr. Murphy, who treated Claimant in February 2002, did not recommend an FCE. Thus, Dr. Flood is the only physician of record who recommended an FCE, and his recommendation was in July 2000. As previously discussed, Dr. Manale stated there is nothing in Claimant's record that constitutes a contraindication to return to work, including his former employment at the shipyard. Dr. Manale's opinion is persuasive, well-reasoned, and supported by the medical evidence of record. Accordingly, I find and conclude Claimant has not established the April 2002 FCE was a reasonable and necessary medical expense.

Moreover, Dr. Manale's discussion on FCEs was in response to a question by Claimant's counsel regarding the "legal issue" of entitlement to compensation. Dr. Manale never offered an opinion regarding whether the April 2002 FCE was necessary for a work-related condition. Likewise, no other physician of record stated the April 2002 FCE was necessary for a work-related condition. Therefore, I find Claimant has not established a **prima facie** case for compensable medical treatment regarding the April 2002 FCE.

Consequently, Employer is not liable for the Crescent City Functional Capacity Evaluation as a compensable medical expense

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[15] Claimant cites "(CX-4, p. 29)" for the proposition Dr. Manale recommended an FCE. There is no such exhibit of record; however, Claimant is ostensibly referring to page 29 of Dr. Manale's deposition found at CX-3, p. 8.

because it was not reasonable and necessary.

However, although I do not find that the costs which Claimant is seeking reimbursement are "medical expenses" within the meaning of Section 7, I find that they may constitute litigation expenses under Section 28 of the Act. In connection with the above I note that Claimant underwent the FCE at the request of Claimant's counsel. No medical treatment was sought, and the evaluations were performed not for the purpose of medical treatment, but rather for litigation and claim purposes. See Cherry v. Newport News Shipbuilding and Dry Dock Company, 8 BRBS 857 , 861 (1978). Thus, these expenses may be paid as necessary litigation or legal expenses under Section 28(a) of the Act together with an attorney's fee if there has been a successful prosecution of the claim at the hearing level.

From the facts presented in this case, I conclude that Claimant was injured while working for Employer, and that as a result he presently suffers from a cervical injury, which is nonetheless an "injury" within the meaning of the Act. Accordingly, Claimant is entitled to future medical expenses under Section 7 of the Act. Because I find that Claimant is entitled to future medical expenses within the provisions of Section 7, there has been a successful prosecution of the claim permitting an attorney's fee and recovery of necessary litigation expenses. See James L. Jackson v. Ingalls Shipbuilding Corp. 15 BRBS 299 (1983).

3. Claimant's July 12, 2001 Visit with Dr. Manale

Although Dr. Manale concluded Claimant's July 12, 2001 visit was "probably" his regularly scheduled visit, Claimant unequivocally testified he then treated with Dr. Manale for his June 2001 automobile accident. Specifically, Claimant stated he called and told Dr. Manale he was involved in an automobile accident, and Dr. Manale told Claimant to "come in and see him." Counsel for Claimant acknowledged that the July 12, 2001 medical benefits of $78.00 were not paid because "it had an automobile accident involved in it...." Claimant's counsel added, "I'm not even trying to get that $78.00 from them." Accordingly, I find the July 12, 2001 visit was related to Claimant's June 2001 automobile accident and is therefore not compensable under Section 7 as a reasonable and necessary medical expense that is the natural and unavoidable consequence of Claimant's April 3, 2000 work-related accident.

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f). Accordingly, upon reaching a state of permanent and total disability on May 16, 2001, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year for the applicable period of permanent total disability, and shall commence October 1, 2001.[16] This increase shall be the lesser of the percentage that the national average weekly wage has increased from the

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[16] See Trice v. Virginia International Terminals, Inc., 30 BRBS 165, 168 (1996)(It is well established that claimants are entitled to Section 10(f) cost of living adjustments to compensation only during periods of permanent total disability, not temporary total disability); Lozada v. Director, OWCP, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990) (Section 10(f) entitles claimants to cost of living adjustments only after total disability becomes permanent).

preceding year or five percent, and shall be computed by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[17] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from April 3, 2000 to May 15, 2001, based on Claimant's average weekly wage of $363.57, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from May 16, 2001 to February 14, 2002, based on Claimant's average weekly wage of $363.57, in accordance with Section 8(a) of the Act. 33 U.S.C. § 908(a).

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[17] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **August 01, 2001**, the date this matter was referred from the District Director.

3. Employer/Carrier shall pay Claimant compensation for permanent partial disability from February 15, 2002 to present and continuing, based on two-thirds of the difference between Claimant's pre-injury average weekly wage of $363.57 and his post-injury earning capacity of $250.22, or $75.57, in accordance with Section 8(c)(21) of the Act. 33 U.S.C. § 908(c)(21).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2001 for the applicable period of permanent total disability.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's April 2000 work-related injury, consistent with this Decision and Order, pursuant to the provisions of Section 7 of the Act.

6. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

7. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 10th day of December, 2002, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge